



Office of the Attorney General
State of Texas

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February 19, 1998

The Honorable Ron Lewis
Chair, Committee on County Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-011

Re: Whether S.B. 1316, Act of May 21, 1997, 75th
Leg., ch. 695, 2332, 2332 changes the result in
Attorney General Letter Opinion Nos. 93-33 (1993)
and 94-72 (1994), regarding the service of state
employees on the boards of water districts (RQ-1012)

Dear Representative Lewis:

You have requested our opinion regarding the effect of recent legislation on two prior opinions of this office. A proviso to article XVI, section 40 of the Texas Constitution states:

State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas, and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts; provided, however, that such State employees or other individuals shall receive no salary for serving as members of such governing bodies.

In Attorney General Letter Opinion 93-33, we said that a \$50.00 per diem allowance established by statute¹ constituted "salary" for purposes of the above-referenced proviso, and as a result, a state employee was entitled to serve on the board of directors of a municipal utility district *only* if he or she declined to accept such payment to the extent that it exceed the employee's actual expenses incurred. Attorney General Letter Opinion No. 93-33 (1993) at 1. Subsequently, in Letter Opinion 94-72, we affirmed the result in Letter Opinion 93-33, while addressing the argument that "salary" for purposes of article XVI, section 40, does not comprehend a per diem payment. Attorney General Letter Opinion 94-72 noted that, under article XVI, section 40, "the terms 'salary' and 'compensation' [are used] interchangeably." Letter Opinion No. 94-72 (1994) at 2. The opinion also quoted the court language in *Turner v. Trinity Independent School District*, 700 S.W.2d 1 (Tex. App.--Houston [14th Dist.] 1983, no writ), to the effect that "article XVI, section 40 allows state employees 'to serve as uncompensated members of local school districts.'" *Id.* at 3.

¹Water Code § 54.114(a).

The Seventy-fifth Legislature amended section 49.060 of the Water Code by adding a new subsection (d),² as follows:

(d) Instead of the fees of office and reimbursement of actual expenses, a director may elect to receive a per diem of \$100 for each day the director actually spends performing the duties of a director. The total per diem received may not exceed \$6,000 per annum except for directors of a special water authority that is engaged in the distribution and sale of electric energy to the public. In order to receive the per diem, each director shall file with the district a general description of the duties performed for each day of service.

Act of May 21, 1997, 75th Leg., ch. 695, R.S., 1997 Tex. Sess. Law Serv. 2332, 2332. The bill analysis for Senate Bill 1316 states:

Currently, directors of water districts are allowed a fee for serving of \$100 per day not to exceed \$6,000 per year. Because a position as director is considered by constitutional and statutory law as an office, state employees and certain local government employees cannot serve as a district director and receive the fee without violating dual office holding provisions. However, officials can receive a per diem payment without it counting as a salary and thus avoid the dual office holding provision. This bill will authorize a director of a water district to elect to receive a per diem payment for each day spent on district business, not to exceed \$6,000 per year.

House Comm. on Natural Resources, Bill Analysis, S.B. 1316, 75th Leg. (1997).

In our opinion, Senate Bill 1316 does not accomplish the purpose of permitting state employees to receive a per diem of \$100 for serving on the boards described therein. The statute states that the \$100 is to be received in lieu of "reimbursement of actual expenses," but it makes no effort to tie the per diem payment to such reimbursement. As we said in Letter Opinion 94-72, "salary" is equivalent to "compensation" for purposes of article XVI, section 40. Had the legislature stated in Senate Bill 1316 that "salary" under article XVI, section 40, did not encompass any kind of per diem payment, one might at least make a plausible argument that a state employee is now entitled to receive such payment. But as Mr. Justice Marshall said so long ago in *M'Culloch v. State of Maryland*, 17 U.S. 316, 4 Wheat. 316, 407 (1819), "we must never forget that it is a constitution we are expounding." *Id.* at 407. And "[i]ts provisions are not to be interpreted like those of a municipal code or of a penal statute." *Wright v. United States*, 302 U.S. 583, 606 (1938). Thus, we have some doubt that anything short of amendment of article XVI, section 40, will suffice to permit

²Chapter 49 of the Water Code is applicable to "general law districts."

a state employee to receive a per diem of \$100, or any other amount not tied to reimbursement of actual expenses, for service of the boards of local governing bodies.³

We conclude that a state employee may serve as a member of the board of directors of a general law district established under chapter 49 of the Water Code only if he or she receives no compensation other than reimbursement of actual expenses.

S U M M A R Y

A state employee may serve as a member of the board of directors of a general law district established under chapter 49 of the Water Code only if he or she receives no compensation other than reimbursement of actual expenses.

Yours very truly,



Rick Gilpin
Deputy Chair
Opinion Committee

³See Letter Opinion Nos. 93-33 (1993), 95-01 (1995).